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SERVICE DATE - SEPTEMBER 15, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42083

GRANITE STATE CONCRETE CO., INC.  
and  
MILFORD-BENNINGTON RAILROAD COMPANY, INC.

v.

BOSTON AND MAINE CORPORATION  
and  
SPRINGFIELD TERMINAL RAILWAY COMPANY

Decided: September 12, 2003

The Board is denying the complainants' request for issuance of an emergency service order under 49 U.S.C. 11123 and 49 CFR part 1146.

The Board is commencing a proceeding, under the modified procedures of 49 CFR part 1112, to consider the complaint of the Milford-Bennington Railroad Company, Inc. (M-B) and Granite State Concrete Co., Inc. (Granite State) that the Boston and Maine Corporation, operating through its subsidiary, the Springfield Terminal Railroad Company (jointly, BM/ST), breached a duty to provide service<sup>1</sup> or committed unreasonable practices.<sup>2</sup>

## BACKGROUND

M-B is a Class III rail carrier subject to Board jurisdiction. M-B has authority to operate, via lease from the State of New Hampshire, a line running from Bennington, NH (M-B milepost 34.9), to Wilton, NH (M-B milepost 16.36). From Wilton to milepost 11.0, about 2 rail miles below Milford, NH, M-B operates, via trackage rights, over track owned and operated by BM/ST.<sup>3</sup> By operating over its leased line and using these trackage rights, M-B transports stone

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<sup>1</sup> See 49 U.S.C. 11101(a).

<sup>2</sup> See 49 U.S.C. 10702(2).

<sup>3</sup> M-B acquired these rights by notice of exemption filed with the Board's predecessor  
(continued...)

from an excavation site owned by Granite State at M-B milepost 19 to a processing plant owned by Granite State near Milford, NH, that is located on BM/ST's line near milepost 13. Before June 20, 2003, M-B had been serving these two Granite State facilities by utilizing the trackage rights over BM/ST's line under an operating window running from 6:30 a.m. to 6:30 p.m. that allowed M-B to run three trains per day, Monday through Friday.

Complaint. By complaint jointly filed on July 14, 2003, Granite State and M-B (complainants) argue that BM/ST is improperly blocking M-B's use of its trackage rights to serve Granite State, and they therefore request an emergency service order under 49 CFR part 1146. Specifically, complainants allege that, as of June 20, 2003, BM/ST restricted M-B's hours of operation to between 1:00 a.m. and 8:00 a.m. (subsequently changed to 4:00 a.m. to 1:00 p.m.). According to complainants, this restriction is unreasonable because M-B cannot provide proper service to Granite State during these hours.<sup>4</sup> M-B states that it had been operating over the segment without this restriction since 1992, and that the trackage rights agreement does not limit M-B's hours of operation.

Complainants maintain that, because of the restricted hours of operation under the trackage rights agreement, M-B has been able to operate only one train per day for Granite State since June 20, 2003, and that this reduction in service creates a "transportation emergency" that will effectively shut down both M-B and Granite State. Complainants ask the Board to remedy the alleged emergency by issuing an order, under 49 U.S.C. 11123 and 49 CFR part 1146, allowing M-B to operate freely over the segment. Complainants also argue that BM/ST's actions constitute "an unreasonable rule or practice" and an "illegal commercial closing of a route," citing 49 U.S.C. 10702 and 10704. Complainants request an award of damages, interest, costs, and attorney's fees for any violations that are found.

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<sup>3</sup>(...continued)

agency, the Interstate Commerce Commission (ICC), in Milford-Bennington Railroad Co. – Trackage Rights Exemption – Boston and Maine Corp. and Springfield Terminal Railway Co., Finance Docket No. 32103, served on July 9, 1992, and published on the same date in the Federal Register at 57 FR 30507. By decision served in the same docket on Sept. 3, 1993, the ICC denied BM/ST's request to revoke the exemption for M-B's alleged breach of its trackage rights agreement.

<sup>4</sup> According to complainants, Granite State is allowed (by the permit for its excavation operations) to operate only during the daytime, between 6:30 a.m. and 6:30 p.m. weekdays, and there is no artificial light that would allow Granite State to operate its excavation site at night. Complainants also state that they need to operate three or four trains per day due to a provision in the trackage rights agreement restricting trains to 10 or fewer cars.

BM/ST's Reply. On July 18, 2003, BM/ST filed a motion to dismiss and reply in opposition to M-B's request for emergency relief under 49 U.S.C. 11123 and 49 CFR part 1146. BM/ST states that complainants can feasibly operate under the current 4:00 a.m. to 1:00 p.m. window by altering M-B's operating times and/or modifying Granite State's facilities, and that BM/ST offered to serve Granite State directly but this offer was refused.<sup>5</sup> BM/ST also suggests that M-B's petition is defective under 49 CFR part 1146, because it fails to provide most of the documentation required by the regulations.

Complainants' Rebuttal. On July 23, 2003, complainants filed what they term a "rebuttal" under 49 CFR 1146.1(b)(3) to BM/ST's reply filed on July 18, 2003.<sup>6</sup> Complainants' rebuttal, accompanied by verified statements, explains that Granite State cannot enlarge its facilities to handle trains with more than 10 cars, even if this were allowed under the trackage rights agreement, and cannot receive adequate service even under the less restricted 4 a.m.-1 p.m. operating window.<sup>7</sup> Complainants also outlined their alleged damages, and served the document on FRA but state that FRA is already familiar with much of this case.

Surreply. On July 25, 2003, BM/ST filed a motion to file a surreply to complainants' rebuttal filed on July 23, 2003, and tendered a surreply. In its surreply, accompanied by verified statements, BM/ST maintains that complainants' service history – a comparison of (a) the number of round trips per day run before the June 20, 2003 operating window reduction (to between 1:00 a.m. and 8:00 a.m.) with (b) the number of round trips/day run after the July 15, 2003 window change (to between 4:00 a.m. and 1:00 p.m.) – shows that Granite State does not

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<sup>5</sup> The parties also raise issues related to rail safety matters. However, under Federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Administrator of the Federal Railroad Administration (FRA). 49 U.S.C. 20101 et seq.; 49 CFR 1.49. Of course, the Board also has responsibility for promoting a safe rail transportation system, 49 U.S.C. 10101(8), but each of the two agencies recognizes the other's expertise, and both agencies exercise their authority in complementary fashion. FRA has expertise in the safety of all facets of railroad operations, while the Board has expertise in economic regulation and, where appropriate, assessment of environmental impacts. See Regulations on Safety Integration Plans Governing Consolidations, Mergers, and Acquisitions of Control, STB Ex Parte No. 574 (STB served Mar. 8, 2002), slip op. at 8-16; Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001). Rail safety matters are, thus, primarily a matter for FRA's oversight in the first instance.

<sup>6</sup> This pleading is more like an opening statement than a rebuttal because it contains the material that, under 49 CFR 1146.1, should have been submitted with the initial complaint.

<sup>7</sup> Under this window, complainants state that M-B is unable to run more than two trains per day and often is able to complete only one trip.

need to run three trains per day. Finally, BM/ST disputes complainants' statement that they have engaged in good faith negotiations. On July 29, 2003, M-B filed a pleading in opposition to admission of BM/ST's tendered surreply.

New Evidence. On July 25, 2003, BM/ST also filed a motion for leave to admit new evidence, a tendered article from the July 25, 2003 edition of the newspaper The Union Leader. The article covers an environmental controversy surrounding M-B's brush clearing and rehabilitation work on its line in connection with passenger operations.

Answer to Complaint. On August 1, 2003, BM/ST filed an answer to M-B's complaint; and a motion to dismiss the entire complaint,<sup>8</sup> on the ground that Granite State's traffic consists only of crushed or broken stone, sand, and gravel, which have been exempted under what is now 49 U.S.C. 10502 (49 CFR 1039.11(a)).

Reply to Motion to Dismiss. On August 20, 2003, complainants filed a reply in opposition to BM/ST's motion to dismiss the complaint due to the exemption from regulation of the commodities being transported here. Complainants argue that the exemption does not apply to the rules and practices of BM/ST and that, even if the exemption does apply, the exemption should be revoked without a separate revocation proceeding so as to allow the complaint to be heard.

Procedural Stipulation. On August 20, 2003, the parties filed a joint proposal for a procedural schedule for the complaint proceeding that establishes the time periods for conducting discovery and filing evidence.

Reply to Request to Revoke. On September 8, 2003, BM/ST filed a reply to complainants' request to revoke the exemption cited by BM/ST in support of its motion to dismiss the complaint. BM/ST argues that the request for revocation must be denied because it was not raised in a separate, "formal petition" for revocation. BM/ST also maintains that both factual and legal grounds for revocation are lacking.

#### PRELIMINARY MATTERS

The surreply tendered by BM/ST will be admitted. Complainants did not satisfy the formal filing requirements of 49 CFR part 1146 until they filed what they captioned as their

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<sup>8</sup> This motion is in addition to its prior motion to dismiss that portion of the complaint seeking alternative service under 49 U.S.C. 11123 and 49 CFR part 1146.

“rebuttal” on July 18, 2003.<sup>9</sup> BM/ST was thus not able to file a complete “reply,” as they are allowed to do under 49 CFR 1146.1(b)(2), until after complainants fully presented their case in their July 18, 2003 filing. BM/ST’s tendered “surreply” will be admitted as the reply they were entitled to file under section 1146.1(b)(2).

BM/ST’s motion to admit the article from The Union Leader will be denied. The Board’s regulations at 49 CFR 1146.1(b)(2) and 1104.13(c) provide only for the filing of one reply by BM/ST, and BM/ST has not provided adequate grounds for an exception. In any event, the article has no direct relevance to the issues in this proceeding.

### DISCUSSION AND CONCLUSIONS

The request for an emergency service order will be denied. Complainants have not shown that BM/ST’s actions have caused, or are causing, a deprivation of service that would trigger 49 U.S.C. 11123 and 49 CFR part 1146. The Board will commence a proceeding under 49 U.S.C. 11701(c) into whether BM/ST is failing to fulfill its common carrier service obligation and engaging in unreasonable practices. At the same time, the parties are strongly urged to pursue alternative means of dispute resolution.

#### Emergency Service Order

The Board is authorized to take action to protect the public’s access to rail transportation under 49 U.S.C. 11123(a), which provides in pertinent part as follows:

(a) When the Board determines that . . . [a] failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board. . . cannot transport the traffic offered to it in a manner that properly serves the public” the Board may, to promote commerce and service to the public, for a period not to exceed 30 days –

- (1) direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines;
- (2) require joint or common use of railroad facilities;
- (3) prescribe temporary through routes; or
- (4) give directions for – (A) preference or priority in transportation; (B) embargoes; or (C) movement of traffic under permits.

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<sup>9</sup> The complaint filed on July 14, 2003, did not contain the “supporting evidence” and other material required under 49 CFR 1146.1(b)(1).

Pursuant to 49 U.S.C. 11123, the Board has adopted regulations at 49 CFR part 1146 for the prescription of alternative rail service where, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier. These regulations contain procedural and substantive requirements for the filing of petitions for relief. Under them, petitioners are required to show, among other things: (1) why the “incumbent carrier,” here alleged to be BM/ST, is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time; and (2) how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent’s overall ability to provide service.

Complainants have not met the requirements for emergency action. BM/ST has revised the original 1:00 a.m.-8:00 a.m. operating window and is now allowing M-B to operate over the trackage rights segment between 4 a.m. and 1:00 p.m. (the “revised window”). Under the revised window, Granite State is being served by about 2 trains per weekday.<sup>10</sup> While this level of service is less than the 3 trains per weekday that M-B frequently operated under the 6:30 a.m.-6:30 p.m. window (the “original window”),<sup>11</sup> it does not constitute an emergency as contemplated by 49 U.S.C. 11123(a) or a substantial material deterioration of service as contemplated by 49 CFR part 1146 as a basis for the extraordinary relief available under those provisions. At least insofar as the request for emergency action is concerned, the record shows that substantial traffic continues to move and that M-B appears to have the ability to increase its service by commencing operations earlier in the morning.

Moreover, under 49 U.S.C. 11123 and 49 CFR 1146.1, the issuance of an emergency service order requires a finding that the “incumbent carrier,” alleged to be BM/ST for the purpose of these provisions, cannot transport the traffic offered to it or cannot restore adequate rail service. Here, BM/ST maintains that it offered to serve Granite State directly but that Granite State declined this offer.<sup>12</sup> Complainants do not deny this and do not show why such alternative service would not be adequate.

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<sup>10</sup> After July 15, 2003, M-B operated 3.5 trains per weekday for 1 day, 2 per weekday for 2 days, and less than 2 per weekday for 3 days. V.S. of Larry L. Ferguson, attached to BM/ST’s surreply filed on July 25, 2003.

<sup>11</sup> Before the original window was closed in June 2003, M-B operated 3 trains per weekday for 18 days and less than 3 trains per weekday for 3 [June and July 2002] and 3 trains per weekday for 10 days and less than 3 trains per weekday for 7 days [June 2003].

<sup>12</sup> V.S. of Thomas F. Steiniger, attached to BM/ST’s reply filed on July 18, 2003.

Adequacy of Service

Although complainants have not justified issuance of an emergency service order under 49 U.S.C. 11123, the Board will commence a proceeding under section 11701(c) to consider whether BM/ST has acted to interfere unreasonably with M-B's ability to meet its common carrier obligations.

As an affirmative defense and in connection with its motion to dismiss the complaint, BM/ST argues that it is not providing "transportation" or "service" to either Granite State or M-B, as those terms are used in 49 U.S.C. 11701(b) and 11704(b). BM/ST's common carrier obligation to Granite State's processing facility, however, did not end when it signed the trackage rights agreement with M-B. Complainants will be allowed to proceed with their complaint that BM/ST unreasonably interfered with M-B's ability to carry out its common carrier obligation by reducing the operating window that M-B was previously utilizing to service Granite State.

As noted by BM/ST, the traffic handled by M-B for Granite State has been exempted from regulation under a class exemption. According to BM/ST, the complaint should therefore be dismissed. Complainants respond that BM/ST's rules and practices related to rail movements of stone are not exempt and must therefore be reasonable. Alternatively, they argue that if the transportation and services provided by BM/ST are exempt, the exemption should be revoked. BM/ST replies that a request for revocation must be raised in a separate, "formal petition" for revocation and that, in any event, the factual and legal basis for revocation is lacking.

Under the provisions of 49 U.S.C. 10502, a formal petition is not required in order for the agency to institute an exemption proceeding or to revoke an existing exemption. Thus, contrary to what BM/ST suggests, the Board has not itself imposed such a requirement. The Board retains the flexibility to evaluate exemption revocation requests that are made in the course of ongoing regulatory proceedings when appropriate. The ability to consider such requests is important where, as here, there is a need for expedition. Thus, the Board will proceed to rule on complainants' request to revoke the exemption.

Under 49 U.S.C. 10502(d), the Board may revoke an exemption when it finds that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Assuming, without deciding, that the exemption applies to BM/ST's transportation and services here, revocation of the exemption, to the extent necessary to allow the Board to give consideration to BM/ST's actions with respect to the service provided by M-B to Granite State, is required to carry out the many provisions of the rail transportation policy favoring competition.<sup>13</sup> In particular, Granite State lacks the competitive service options that were the basis for the original class exemption because its excavation permit requires that stone move by railroad, not by truck,

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<sup>13</sup> See 49 U.S.C. 10101(1), (4), (5), (6), and (12).

to avoid movements through Wilton.<sup>14</sup> Thus, the class exemption will be revoked for the traffic in this proceeding to the extent described above, and BM/ST's motion to dismiss the complaint will be denied.

#### Procedural Stipulation

The procedural schedule proposed by the parties will allow the Board to hear this proceeding expeditiously and fairly. It will be adopted.

#### Alternative Dispute Resolution

This dispute would seem to be a good candidate for resolution pursuant to private negotiation between the parties; or by using the Board's alternative dispute resolution processes of arbitration or mediation. See 49 CFR parts 1108 and 1109. The parties are strongly urged to explore these options.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

#### It is ordered:

1. BM/ST's motion to admit its surreply is granted, and BM/ST's motion to admit the article from The Union Leader is denied.
2. Complainants' request for an emergency service order under 49 U.S.C. 11123 and 49 CFR part 1146 is denied.
3. The exemption from regulation of Granite State's traffic is revoked to the extent necessary to resolve the issues raised in this investigation.
4. BM/ST's motion to dismiss the complaint is denied.
5. The Board is commencing a proceeding to investigate whether BM/ST's conduct toward M-B is in breach of its obligation to provide service or constitutes an unreasonable practice and whether damages for any violations are in order.

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<sup>14</sup> V.S. of Peter R. Leishman, attached to complainants' rebuttal filed on July 23, 2003. BM/ST does not dispute this.



6. The parties will adhere to the following schedule for discovery and the submission of evidence:

a. Discovery will be completed by October 30, 2003, during which time depositions may be taken according to the stipulation filed on August 20, 2003.

b. Opening statements from both parties are due by December 1, 2003;

c. Reply statements from both parties are due by December 29, 2003;

d. Rebuttal statements from both parties are due by January 13, 2004.

7. This decision is effective on September 15, 2003.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary